Supreme Court, U.S.
FILED
AUG 28 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2147

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENT BORDEN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Block v. *Consino*, 535 F.2d 1165, cert. denied, 429 U.S. 861 3

Kastigar v. *United States*, 406 U.S. 441 ..... 1, 3, 4, 5, 6

Murphy v. *Waterfront Comm'n*, 378 U.S. 52 6

United States v. *Beery*, 678 F.2d 856 5

United States v. *Catalano*, 491 F.2d 268, cert. denied, 419 U.S. 825 5

United States v. *DeDiego*, 511 F.2d 818 5

United States v. *Johnston*, 268 U.S. 220 5

United States v. *Jones*, 542 F.2d 186 4

United States v. *Kurzer*, 534 F.2d 511 5

United States v. *Provenzano*, 620 F.2d 985, cert. denied, 449 U.S. 899 5

United States v. *Romano*, 583 F.2d 1 ..... 4, 5

United States v. *Sockwell*, 699 F.2d 213, cert. denied, 461 U.S. 936 5

United States v. *Tantalo*, 680 F.2d 903 5

United States v. *Weiner*, 578 F.2d 757, cert. denied, 439 U.S. 981 6

Page

Constitution and statutes:

U.S. Const. Amend. V 3

Bankruptcy Act § 7(a)(10), 11 U.S.C. (1976 ed.) 25(a)(10) 3

Bankruptcy Reform Act of 1978, 11 U.S.C. 344 3

18 U.S.C. 152 1

18 U.S.C. 371 1

18 U.S.C. 6001 *et seq.* 3

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2147

KENT BORDEN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government's documentary proof that the sources for its evidence were independent of his immunized testimony was insufficient to meet its burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972).

1. Following a bench trial in the United States District Court for the Central District of California, petitioner was convicted on four counts of bankruptcy fraud and one count of conspiracy to commit bankruptcy fraud (18 U.S.C. 152, 371). He was sentenced to concurrent terms of five years' imprisonment, all but six months of which were suspended in favor of probation, and fined $20,000. The court of appeals affirmed (Pet. App. 1a-9a).

a. The evidence at trial, the sufficiency of which is not disputed, showed that petitioner concealed an asset of a bankrupt estate from the court and creditors, fraudulently received funds of the estate, and withheld documents of the estate from the trustee in bankruptcy (Pet. App. 3a).

Petitioner was president and majority shareholder of Global Western Development Corporation (Global) (Pet. App. 2a). In February 1975, Global purchased 2,700 acres of undeveloped land known as the Whiting Ranch from El Toro Associates for $2 million, including a $1.6 million purchase money mortgage (*id.* at 2a, 11a). Global defaulted on its purchase mortgage in July 1975, and El Toro elected to foreclose; Global initiated unsuccessful proceedings to enjoin the foreclosure (*id.* at 12a-13a).

On October 4, 1976, petitioner transferred ownership of the ranch to his personal holding company. Two hours later, he and his attorney, Jacob N. Peilte,[1] filed a bankruptcy petition on behalf of Global. A foreclosure sale with respect to other property of Global's had been scheduled for the next day. Pet. App. 2a.

Statements of Global's assets filed by petitioner and Peilte did not list the Whiting Ranch or mention its transfer, although in a separate condemnation proceeding later in 1976 petitioner testified that Global owned the property (Pet. App. 14a). In September 1977, a creditor informed the bankruptcy court for the first time of the ranch (*id.* at 15a). A trustee was then appointed, and petitioner signed a stipulation voiding the transfer to his holding company (*id.* at 2a-3a). The trustee requested that petitioner and Peilte provide him with all records of Global's financial affairs. Although they assured the trustee that no records had been withheld, Global's former landlord later found several file cabinets of the company's records and turned them over to the trustee. *Id.* at 3a. During 1977, petitioner and Peilte fraudulently received funds of Global's estate (*id.* at 14a-15a, 20a).

---

[1]Peilte was tried with petitioner and convicted on five counts of bankruptcy fraud and one count of conspiracy. His conviction was affirmed on appeal, and he did not file a petition for a writ of certiorari.

b. Prior to trial, petitioner moved pursuant to *Kastigar* v. *United States*, 406 U.S. 441 (1972), to require the government to prove that it did not use his immunized testimony before the bankruptcy court[2] in preparing its case against him. The government responded by filing sworn declarations of the prosecutors, the bankruptcy trustee, investigators and others, denying the government's access to or use of petitioner's immunized testimony and affirmatively specifying independent sources for its evidence against petitioner. After a hearing on the motion, the court found that the government's evidence was not tainted by petitioner's bankruptcy testimony (Pet. App. 5a); the court adhered to its ruling when petitioner renewed his motion during and after trial. The court of appeals affirmed, ruling that the government's "exhaustive filing" (*ibid.*) satisfied its burden under *Kastigar*.

2. Petitioner contends (Pet. 7-14) that the sworn declarations filed by the government did not satisfy its burden of proving an independent source for its evidence. His heavily factual arguments were correctly rejected by both courts below, and the court of appeals' decision does not conflict with the decisions of this Court or of any other court of appeals. Further review is unwarranted.

a. Petitioner appears to claim (Pet. 10-12) that the government's declarations did not adequately trace its evidence to sources independent of his immunized testimony.

---

[2]Section 7(a)(10) of the former Bankruptcy Act (11 U.S.C. (1976 ed.) 25(a)(10)), which governed the Global proceeding, provided for automatic use and derivative-use immunity coextensive with the Fifth Amendment privilege against compelled self-incrimination. See *Block* v. *Consino*, 535 F.2d 1165, 1168 (9th Cir.), cert. denied, 429 U.S. 861 (1976). The present immunity provision of the Bankruptcy Code (11 U.S.C. 344) incorporates Part V of Title 18 (18 U.S.C. 6001 *et seq.*), which also provides immunity coextensive with the Fifth Amendment, but only after the privilege is invoked and immunity is applied for and granted. See *Kastigar* v. *United States, supra.*

The district court's decision to the contrary is not clearly erroneous[3] and was correctly upheld by the court of appeals. The declarations affirmatively traced the government's evidence to sources wholly independent of petitioner's testimony before the bankruptcy court.[4] On the basis of these declarations, the government demonstrated untainted sources for all of the evidence necessary for petitioner's conviction, including Global's purchase of the Whiting Ranch; its transfer to petitioner's holding company two hours before he and Peilte filed for bankruptcy on behalf of Global; their failure to list the ranch as an asset of Global's; the trustee's discovery of undisclosed documents relating to the financial affairs of Global; and petitioner's unauthorized receipt of funds belonging to the bankrupt estate. See, *e.g.*, Declaration and Supplemental Declaration of Percy Anderson; Declaration of Joseph Cordero paras. 3-7; Declaration of Richard S. Roberts paras. 8-10; Declaration of Robert A. Fisher. Review by this Court of petitioner's

---

[3]A district court's finding that the government has met its burden of proof under *Kastigar* is one of fact reviewable under the clearly erroneous standard. *E.g., United States* v. *Romano*, 583 F.2d 1, 7 (1st Cir. 1978); *United States* v. *Jones*, 542 F.2d 186, 199 (4th Cir. 1976).

[4]Petitioner's claim (Pet. 10) that one of the prosecutor's declarations, which specified a newspaper article as an independent source, did not negate the reporter's access to immunized testimony is irrelevant in light of the reporter's own declaration, which did just that (as well as specifying the untainted sources relied on by the reporter). See Declaration of Joseph Cordero. Petitioner's assertion (Pet. 10-11) that the reporter's declaration is internally inconsistent is meritless. The full text of the statement quoted by petitioner (*id.* at 10) is "On the basis of that preliminary research, I expanded my inquiry to the United State [*sic*] Bankruptcy Court in Santa Ana *to examine a bankruptcy petition and a schedule of creditors filed in conection with the Whiting Ranch.*" Declaration of Joseph Cordero para. 4 (emphasis added). This is not inconsistent with the reporter's later statement (*id.* para. 7) that he did not have access to the "court proceedings," which referred quite obviously in context to petitioner's immunized courtroom testimony.

fact-bound claim that these declarations were inadequate is unwarranted. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

b. Petitioner's chief contention (Pet. 7-9, 12-14) is that he should have been permitted to cross-examine the government's declarants. This argument appears to be based in large part on petitioner's claim, just discussed, that the declarations did not contain enough information to satisfy the government's burden of proof (see *id.* at 12). To the extent that petitioner asserts an entitlement to a hearing at which live testimony is elicited even where documentary evidence has demonstrated an independent source, that claim is meritless. The courts of appeals have rejected the contention that live testimony is always required in order to prove that the government's evidence is not tainted by a defendant's immunized testimony.[5] See *United States* v. *Provenzano*, 620 F.2d 985, 1005-1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Sockwell*, 699 F.2d 213, 217-218 (5th Cir.), cert. denied, 461 U.S. 936 (1983); see also *United States* v. *Romano*, 583 F.2d 1, 8 (1st Cir. 1978); *United States* v. *Catalano*, 491 F.2d 268, 272 (2d Cir.), cert. denied, 419 U.S. 825 (1974). Petitioner admitted

---

[5]The cases on which petitioner relies (Pet. 8-9) do not stand for the propositon that a full-fledged hearing is always required under *Kastigar*. In *United States* v. *Tantalo*, 680 F.2d 903 (2d Cir. 1982), and *United States* v. *Beery*, 678 F.2d 856 (10th Cir. 1982), the government had only disclaimed use of immunized testimony without affirmatively demonstrating an independent source for its evidence. The courts did not address the question whether proper documentary evidence could satisfy the government's burden of proof. In *United States* v. *Kurzer*, 534 F.2d 511 (2d Cir. 1976), and *United States* v. *DeDiego*, 511 F.2d 818 (D.C. Cir. 1975), the courts held only that the indictments should not have been dismissed without affording the government an adequate opportunity to disprove the defendants' taint claims. Finally, none of the cases cited by petitioner (Pet. 9) as relying on testimonial evidence required that the evidence be live rather than documentary; the cases simply did not address that issue.

in the court of appeals that he was given opportunities to come forward with evidence of taint to rebut the government's showing, but did not do so. See Appellant's Opening Br. 28. The procedure followed by the district court was accordingly fully adequate to protect petitioner's interests. See *United States* v. *Weiner*, 578 F.2d 757, 774-775 (9th Cir.), cert. denied, 439 U.S. 981 (1978) (requiring defendant to present evidence of taint after government has proven an independent source does not improperly shift burden of proof to defendant). Nothing more is required by this Court's decision in *Kastigar*[6] or by the decisions of any of the courts of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984

---

[6] *Kastigar* "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony" (406 U.S. at 460). As both courts below held, the government satisfied that burden here by producing the declarations of its prosecutors and others. There is nothing in *Kastigar* or in *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964), that would require live testimony in these circumstances.